IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 350

ALL SERVICE LAUNDRY CORPORATION, *Petitioner*,

v.

LILLIAN MAUD PHILLIPS, as Administratrix of the goods, chattels and credits of CLIFFORD R. PHILLIPS, deceased, JOSEPH BONURA, TONY ZUMMO, TONY SALADINO, CHARLES SALADINO, PHILLIP PERRI, ALBERT JETT, DANNY FANTO, THELMA DOUGLAS, ADA BERKELEY, individually and on behalf of all other employees of defendant similarly situated.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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August, 1945.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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All Service Laundry Corporation (hereinafter referred to as "All Service") prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit in this case.

## OPINIONS BELOW.

The opinion of the District Court (R. 18-20) is reported in 55 F. Supp. 238. The opinion of the Circuit Court of Appeals (R. 47-54) has not yet been reported.

## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 2, 1945 (R. 60). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED.

1. Whether a laundry whose principal customer is a company which supplies laundry service to persons employed in commerce and industry is a "service establishment" within the exemption provided by Sec. 13 (a) (2) of the Fair Labor Standards Act of 1938.

2. Whether garments laundered for return to their previous users constitute "goods" under Sec. 3(i) of the Fair Labor Standards Act, which defines that term as not including "goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

3. Whether the Fair Labor Standards Act applies to employees of a laundry all of whose customers and business transactions are within the State of New York, where 4% of the laundered garments ultimately moves in interstate commerce.

## STATUTORY PROVISIONS INVOLVED.

The statutory provisions involved are Sections 3 (i) and 13 (a) (2) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201, et seq., which read as follows:

SEC. 3. As used in this Act—

* * * * * *

(i) "Goods" mean goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

* * * * * *

SEC. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *

## STATEMENT.

This suit was initiated on October 15, 1942, in the United States District Court for the Southern District of New York, under Section 16 (b) of the Fair Labor Standards Act of 1938, 52 Stat. 1069, 29 U. S. C. sec. 216(b), to recover for the plaintiffs, and for others similarly situated, overtime compensation and liquidated damages. The original defendant was Star Overall Dry Cleaning Laundry Company, Inc. (hereinafter referred to as "Star"), but upon trial All Service was by stipulation made a party defendant. At the trial a written stipulation of facts was filed (R. 15, 16) and additional facts were stipulated orally (R. 10-14). No further testimony was taken.

The facts may be summarized as follows (R. 15, 16):

All Service is engaged in the laundry business, with all of its customers located within the State of New York. During the period in question 80% of its work of cleaning, pressing, and laundering overalls, slacks, coats, union suits, pants and hoovers was performed for Star. Both corporations have their principal place of business in Brooklyn, New York.

Star was engaged in the business of collecting soiled linens, overalls, slacks, coats, pants, union suits and hoovers, and of having them laundered or otherwise cleaned. It then returned them to its customers and was paid a fee for the service. During the period in question 95% of its business was with people within the State of New York and 5% with people outside the State of New York. Its business was done with individuals to the extent of 82% and 18% was "bulk," a term meaning that the soiled clothes were received in larger bundles than those collected from individuals (R. 13). Its customers were persons employed in various kinds of industrial, business and professional establishments.

The complaint was dismissed as to Star upon a finding that the plaintiffs were not its employees (R. 23). Judgment was entered against All Service in favor of each plaintiff for stipulated amounts without interest and for a stipulated attorney's fee (R. 24-25).

The defendants appealed from the judgment of the District Court (R. 26) and the plaintiffs took a cross appeal (R. 34) because of the disallowance of interest, an issue which they subsequently abandoned. After hearing argument, the Circuit Court of Appeals reversed the District Court and dismissed the complaint (R. 36-42) on the ground that the garments on which the plaintiffs worked were not "goods" within the Fair Labor Standards Act since that term as defined in Section 3(i) "does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than the producer, manufacturer or processor thereof." Plaintiffs filed a petition for rehearing (R. 42-46), after which the court withdrew its original opinion and rendered a new decision affirming the judgment of the District Court (R. 47-54). Thereupon defendant petitioned for a rehearing (R. 55-58), which petition was denied (R. 59).

## REASONS FOR GRANTING THE WRIT.

### I.

**The Circuit Court of Appeals has erroneously decided important questions of Federal law which have not been, but should be, settled by this Court.**

1. *The scope of the "service establishment" exemption.*

Although taking it for granted that a laundry is a typical example of a service establishment, the Court below held that the employees of All Service did not come within the exemption of Sec. 13 (a) (2) because they would not have been exempt if employed by Star in the same capacity (R. 53). The Court does not explain why Star is not to be regarded as a service establishment, except to say that it was engaged in "production" rather than "servicing" (R. 53). Star's "production" consisted of supplying laundry service to persons working in commercial and industrial establishments (R. 15, 16). The decision below thus directly raises the question whether such activities make Star a "retail or service establishment" within the meaning of Sec. 13 (a) (2).

Prior to this decision it was generally accepted that businesses like Star's were service establishments since they qualified as such under the following provision in paragraph 27 of Interpretative Bulletin No. 6 of the Wage and Hour Division (CCH Labor Law Service, par. 32, 106):

> "The cleaning of garments such as uniforms worn by industrial workers will not alter the character of the establishment as a service establishment, if the work is performed at the normal price charged to private customers or if the transaction does not involve a quantity of goods materially larger than the normal quantity serviced for private customers."

Star even meets the Administrator's definition of *retail* service establishment, since under paragraph 18 of Interpretative Bulletin No. 6 nonretail sales which constitute

less than 25% of total gross receipts are not deemed sufficiently substantial to deprive the establishment of its retail character. The stipulation of facts reveals that 82% of Star's business was with private individuals (R. 16). Moreover, only 5% of Star's business was with customers outside of New York State (R. 15). Star is, therefore, one of "those retailers located near the state lines and making some interstate sales" for whom the exemption in Sec. 13 (a) (2) was intended. *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571.

The indirect approach adopted by the Court below should not obscure the basic question, which is whether All Service, rather than Star, is a service establishment. This raises a question which has been troubling the Administrator and the courts for several years, namely, whether the exemption for "retail or service establishments" is to be restricted in its application to retail establishments alone. The conflicts which have arisen over this question in the Circuit Courts of Appeals are discussed below in Section II.

If the exemption should be construed as limited to establishments of a retail character, two important questions will remain as to what constitutes a retail service establishment. First, does a laundry cease to be retail because its customers use the cleaned garments in connection with their work in commercial or industrial establishments? As indicated above, the Administrator has heretofore regarded launderies as nonretail only if their sales were made to commercial or industrial firms, not when made to individual employees.

Second, does a laundry cease to be a retail service establishment because sales and deliveries to the ultimate consumers are made by another company? The Wage and Hour Division has consistently held that the intervention of such a company does not alter the retail character of the service performed by the primary establishment. This policy is set forth in the following official statement:

"Work performed by a central cleaning plant on the garments of private individuals will be considered work of an exempt type for purposes of Section 13 (a) (2) exemption even though the goods may be received through a branch or independent shop." Wage and Hour Field Operations Bulletin, Vol. II, No. 2, September 22, 1941 (2 C. C. H. Labor Law Service, par. 25, 551.831).[1]

Thus it appears that with respect to both Star and All Service the decision below reaches conclusions contrary to official interpretations of the Wage and Hour Division and adds to the confusion which has always existed concerning the proper application of Sec. 13 (a) (2).

2. *The significance of the exclusion of "goods after their delivery into the actual physical possession of the ultimate consumer."*

The plaintiffs worked on garments which had been sent out for laundering by persons who had worn and soiled them. They were regularly returned to the same users, who were thus the "ultimate consumer[s] thereof."[2] Articles cease to be "goods" within the definition of Section 3(i) of the Act "after their delivery into the actual physical possession of the ultimate consumer thereof." Hence the plaintiffs were not engaged in the production of goods for commerce and were not covered by the Act.

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[1] See also Wage and Hour opinion letter, September 20, 1940, holding that a local cleaning and dyeing establishment which does work for independent tailor shops in other states is exempt under Sec. 13 (a) (2) where the bulk of its business is intrastate (2 C. C. H. Labor Law Service, par. 25, 551.83). See similar Wage and Hour opinion letter: June 3, 1942, re watch repairing (*ibid* par. 25, 551.886); also Wage and Hour release September 26, 1941 (*ibid* par. 25, 551.8875).

[2] The record is silent as to who owned the garments. Since, however, the Circuit Court of Appeals made assumptions as to facts not in the record which are contrary to the actual facts, it is necessary to point out that the majority of the garments were the property of their users and that even the rented garments were regularly returned to the same users until they were worn out.

The Court below adopted this view in its first opinion but reversed itself on rehearing on the basis of the erroneous assumption that "a large part, if not all," of the garments were rented and "very likely" were not rented to the same customers each time after cleaning. The stipulation of facts states:

> "The defendant, Star Overall Dry Cleaning Laundry Company, Inc., during the period mentioned in the complaint was engaged in the business of collecting soiled linens, overalls, slacks, coats, pants, union suits, and hoovers, having the same laundered or cleaned and *returned* for a fee." (emphasis supplied) (R. 15.)

The use of the word "returned" establishes that the garments were repeatedly used by the same persons. Such users, it is submitted, are, in the common understanding and within the meaning of Section 3(i), the "ultimate consumer[s] thereof".

The Circuit Court of Appeals erroneously treated Star as the ultimate consumer and compared the work done by the plaintiffs with that performed by employees who repair machinery, stating, "Indeed, this recurrent cleaning and pressing was so like repairs for use that cases dealing with the effect of the statute upon employees engaged in making such repairs are in point." On June 18, 1945, this Court granted certiorari to the Circuit Court of Appeals for the Fourth Circuit in *Walling* v. *Roland Electrical Co.*, 146 F. 2d 745, and to the Circuit Court of Appeals for the Sixth Circuit in *Boutell* v. *Walling*, 148 F. 2d 329, both of which involve the question of the application of the Act to such repairmen. If the analogy drawn in the opinion below is sound, the decision of this Court in those cases may have a substantial bearing upon the instant case.

3. *Non-applicability of the Fair Labor Standards Act to businesses essentially local in character.*

All Service dealt only with customers located within New York State and engaged in no transactions of which any element took place outside the State. Its principal customer, however, accounting for 80% of its business, made 5% of its sales to persons outside of the State (R. 15). There is nothing in the record to indicate whether or not these particular plaintiffs worked upon the garments which ultimately were transported across the State line. Assuming, however, that they did, such garments constituted only 4% of their output.

Thus, the facts show that All Service remained at all times essentially a local business and, as this Court declared in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 570,

> "• • • we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States."

In its recent decision in *10 East 40th Street Building* v. *Callus*, 324 U. S. , this Court said:

> "Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business."

The same can be said for an enterprise like All Service, which conducts every element of its business transactions in New York State[3] and approaches the sphere of inter-

[3] The Wage and Hour Administrator has ruled that "in determining the applicability of the section 13 (a) (2) exemption, the selling or servicing of the establishment will be considered in intrastate commerce in all cases in which all the elements of the sale or service take place within the State in which the establishment is located, irrespective of the source of the goods and the retail or nonretail character of the transaction". Interpretative Bulletin No. 6, par 46, 2 C. C. H. Labor Law Service, Par. 32,106.

state commerce only through the fact that its principal customer does 5% of its business outside of the State.

If, under these circumstances, the activities of All Service employees constitute "the production of goods for commerce" within the meaning of Section 7 of the Act, 52 Stat. 1067, 29 U. S. C. sec. 207, then such production must be deemed so insubstantial as to justify the application of the maxim *de minimis non curat lex*. This Court intimated in the *Jacksonville Paper Co.* case (page 572) that a substantial part of an employee's activities must relate to goods moving in the channels of interstate commerce in order to bring into play the coverage of the Act.

The question of what constitutes a substantial part of an employee's activities for this purpose has repeatedly arisen and calls for clarification by this Court. See, for example, *Southern California Freight Lines* v. *McKeown*, 148 F. 2d 890 (C. C. A. 9, 1945); *New Mexico Public Service Co.* v. *Engel*, 145 F. 2d 636 (C. C. A. 10, 1944), and cases cited therein; *Goldberg* v. *Worman*, 37 F. Supp. 778 (S. D. Fla. 1941); *Whitsitt* v. *Enid Ice & Fuel Co.*, 6 Labor Cases par. 61,226 (D. C. Okla. 1942); *Brown* v. *Tracy Bottling Co.*, 6 Labor Cases par. 61,109 (D. C. Minn. 1942); *McDaniel* v. *Clavin*, 128 Pac. (2d) 821 (Cal. App. Ct. 1942), aff'd 136 Pac. (2d) 559; *Morrow* v. *Lee Baking Co.*, 4 Labor Cases, par. 60,701 (N. D. Ga. 1941); *Lamb* v. *Quality Baking Co., Inc.*, 3 Labor Cases, par. 60,042 (Tenn. Ct. App. 1940).

It is submitted that the test should be whether the employment remains essentially local in its character and its effect upon commerce.

## II.

**The decision of the Court below conflicts in principle with the decisions of the Circuit Court of Appeals for the Sixth Circuit in Lonas v. National Linen Service Corporation, 136 F. 2d 433, cert. den. 320 U. S. 785, and in Martino v. Michigan Window Cleaning Co., 145 F. 2d 163, as to which this Court granted certiorari on June 18, 1945.**

The conflict which exists among the decisions of the Circuit Courts of Appeals over the meaning of the "retail or service establishment" exemption was summarized in the opinion below as follows:

> "It has been held that despite the disjunctive 'or' between retail and servicing in subdivision (a) (2) of §13, the legislative history, coupled with other considerations taken to be persuasive, makes the proper construction of this subdivision one of the limitation of servicing to retail servicing, i.e., to the selling of services, instead of goods, at retail. Some of these cases are *Bracey* v. *Luray, supra; Guess* v. *Montague,* 140 F. (2) 500; *Walling* v. *Roland Electrical Co.,* 146 F. (2) 745; *Walling* v. *Sandok,* 132 F. (2) 77; and *Reynolds* v. *Salt River Valley Water Users Association,* 143 F. (2) 863. The contrary view was taken in *Lonas* v. *National Linen Service Corporation,* 136 F. (2) 433. See also *Martino* v. *Michigan Window Cleaning Co.,* 145 F. (2) 163; *Stucker* v. *Roselle,* 37 F. Supp. 864." (R. 52.)

Although the Court by reason of its erroneous assumption as to the character of Star avoided a direct holding on this issue, it makes quite clear its own preference for the theory that "retail or service establishment" should be construed to mean "retail service establishment" (R. 52, 53).

This construction ignores the plain language used by Congress to express its intention and misinterprets the legislative history of Section 13(a) (2).[4] It creates an artifi-

[4] In a letter dated July 2, 1942 the Administrator of the Wage and Hour Division wrote to Representative Fred A. Hartley, Jr., who was ranking member of the House Labor Committee which

cial and illogical distinction between a retail laundry and a nonretail laundry, both of which are essentially localized community services, employing the same type of workers, using the same type of equipment, performing similar functions and competing for the same business. No such distinction is made by other governmental agencies, Federal or State, which uniformly treat all branches of the laundry trade as a single category.[5]

On June 18, 1945 this Court granted certiorari in the *Roland Electrical Co.* case and the *Michigan Window Cleaning Co.* case, cited by the Second Circuit as representing conflicting views. The existence of conflict among the circuits on this question was recognized by counsel for the Wage and Hour Administrator in his memorandum in response to the petition for a writ of certiorari in the *Roland Electrical Co.* case. This memorandum also pointed out that "The divergency of judicial opinion as to the meaning of 'retail or service' in Sec. 13 (a) (2) has produced a difficulty in the administration of this portion of the statute".

Counsel for the petitioner contend that the instant case should have been decided in favor of the petitioner upon the authority of *Lonas* v. *National Linen Service Corporation*

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handled the Act as well as a member of the Conference Committee which drafted the final language of Section 13 (a) (2), as follows: "I am very much inclined to the view that all laundries, regardless of whether they do so-called commercial work or not, were intended by the Congress to be exempt, as you definitely state * * *." Cong. Rec. Vol. 89, p. A1024, 78th Cong. 1st Session.

[5] In the card catalog of the U. S. Department of Labor Library are nearly one hundred references to the laundry trades and working conditions therein. An examination of these references revealed unanimity in description of the laundry trades as service industries. There is not a single instance of an effort to distinguish between wholesale and retail laundries. The same is true of the minimum wage orders issued by the various states. See C. C. H. Labor Law Service, par. 45,501 under name of each state. The orders in Massachusetts, Ohio, and a number of other states specifically include in their definition of laundry trade or occupation "the collecting, sale, resale or distribution at retail or wholesale of laundry services."

and *Martino* v. *Michigan Window Cleaning Co., supra.* Since the principle involved in both cases will be passed upon by this Court during the next term, it is essential that this petition be granted so that the rights of the petitioner may be preserved.

None of the cases in which certiorari has been granted involves the laundry industry. Nevertheless, the disposition of these cases has a direct bearing upon the *Lonas* decision, in reliance upon which members of the laundry industry have assumed that they were exempt from the coverage of the Fair Labor Standards Act. It is, therefore, important that a case involving the laundry industry be before this Court when it has under examination the principle established in the *Lonas* decision.

## CONCLUSION.

This case involves important questions of Federal law which have not been, but should be, settled by this Court. The decision below leaves a large segment of the laundry industry in great confusion as to its status under the Fair Labor Standards Act. The conflicts which exist among the circuit courts of appeals concerning the scope of the service establishment exemption and the importance of this question in the administration of the Act have been recognized by this Court in the granting of certiorari in three cases to be heard at the coming term. It is appropriate that while this issue is before the Court the status of the laundry industry under the Act be clarified.

It is, therefore, respectfully submitted that this petition should be granted.

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